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AT CHARLOTTESVILLE, VA  
FILED

JAN 29 2010

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1 Attorneys for Plaintiff  
2 ACCESS DESIGNS, INC.

3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF VIRGINIA

5 Access Designs, Inc., a Virginia  
6 corporation,

Case No. 3:10CV00005

7  
8 Plaintiff,

9 vs.

10 The BathWorks Company,  
11 Greg Murphy, and  
12 Ellen Murphy,

13 Defendants.  
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1                   **COMPLAINT FOR TRADEMARK INFRINGEMENT, UNFAIR**  
2                   **COMPETITION, AND DILUTION.**

3           Plaintiff, Access Designs, Inc., by its attorneys identified below, brings this action  
4           against Defendants, The BathWorks Company, Greg Murphy, and Ellen Murphy  
5           ("Defendants"), and alleges that:  
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7                                   **THE PARTIES**

8           1.       Plaintiff is a corporation organized and existing under the laws of Virginia,  
9           having corporate offices at 1304 East Market Street, Suite P Charlottesville,  
10          Virginia 22902.

11          2.       On information and belief, Defendant The BathWorks Company  
12          ("BathWorks") is a company existing under the laws of Rhode Island, having  
13          offices at 42 Rosewood Lane, Cumberland, RI 02864, and is conducting business in  
14          this District and elsewhere.

15          3.       On information and belief, Defendant Greg Murphy is an individual  
16          having an address at 42 Rosewood Lane, Cumberland, RI 02864, is a principal of  
17          BathWorks, and/or directs the operations of BathWorks (or alternatively, Defendant  
18          Individual and BathWorks are alter egos).

19          4.       On information and belief, Defendant Ellen Murphy is an individual  
20          having an address at 42 Rosewood Lane, Cumberland, RI 02864, is a principal of  
21          BathWorks, and/or directs the operations of BathWorks (or alternatively, Defendant  
22          Individual and BathWorks are alter egos).

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24                                   **ALLEGATIONS COMMON TO ALL COUNTS**

25          5.       This action arises under the federal trademark, unfair competition, and  
26          dilution laws for trademark infringement, as a result of Defendants' willful  
27          infringement of valid rights in the Plaintiffs TubcuT trademark, as hereinafter  
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1 defined, and other unlawful activities conducted by Defendants in connection with  
2 such infringement.

3 6. This court has jurisdiction under 15 U.S.C. Section 1121, and 28 U.S.C.  
4 Sections 1331, 1332, and 1338. The amount in controversy exceeds the sum or  
5 value of \$75,000 exclusive of interests and costs

6 7. Venue is proper under 28 U.S.C. Sections 1391(b) and (c).

7 8. Plaintiff has been and now is extensively engaged in the business of  
8 selling goods and services ("Plaintiff's Goods and Services") under the trademark  
9 "TubcuT" ("the Mark") continuously since at least 2001 in interstate commerce.

10 9. The Mark is used extensively on and in connection with Plaintiff's Goods  
11 and Services, e.g., on its products, in brochures and other printed promotional  
12 materials distributed by Plaintiff, and on the Internet.

13 10. Plaintiff's Goods and Services in connection with which the Mark has  
14 been used have been extensively promoted and marketed through various forms of  
15 media. As a result of such promotional and marketing efforts, and the quality of  
16 Plaintiff's Goods and Services, the Mark has become widely and favorably known, a  
17 valuable asset of Plaintiff and symbol of its goodwill, and has acquired  
18 distinctiveness and secondary meaning.

19 11. In recognition of the valuable goodwill and rights in the Mark owned by  
20 Plaintiff, the United States Patent and Trademark Office ("USPTO") has granted  
21 United States Trademark Registration No. 3663121 to the Mark (Exhibit A).

22 12. The registration is in full force and effect and uncanceled and constitutes  
23 conclusive evidence of the validity of the Mark, Plaintiff's ownership thereof, and  
24 its exclusive right to use the Mark throughout the United States subject to conditions  
25 set out by the USPTO.

26 13. On information and belief, Defendants are also engaged in the business of  
27 selling goods and/or services ("Defendants' Goods and Services") in competition  
28 with Plaintiff.

1 14. Defendants conduct business activities from at least one business  
2 establishment in this District and/or over the Internet.

3 15. Defendants were a former representative of Access Designs.

4 16. On information and belief, as a former representative of Access Designs,  
5 Defendants had actual knowledge of Plaintiff's Mark and proprietary technology.

6 17. On information and belief, subsequent to termination of Defendants as  
7 representatives of the Plaintiff, the Defendants have used the phrases "Tubcut" and  
8 "Tubcuts" in advertising their goods and services (Exhibits B and C).

9 18. Upon termination of Defendants as representatives of the Plaintiff, the  
10 Defendants were formally advised that further use of the Mark and/or confusingly  
11 similar marks was unlawful, yet Defendants have continued to willfully infringe the  
12 Mark.

13 19. On information and belief, the phrase "Tubcuts" and "TubcuT" are  
14 confusingly similar to the mark "TubcuT", which has created and continues to  
15 create a likelihood of confusion of origin among purchasers of goods and/or services  
16 provided by the Defendants.

17 20. On information and belief, Defendants have pirated the Plaintiff's  
18 proprietary technology and are using that technology in goods and/or services that  
19 they are selling.

20 21. Notwithstanding Plaintiff's continuous and exclusive use of and well-  
21 known prior rights in its Mark, Defendants have sought to compete unfairly with  
22 Plaintiff by appropriating for use the Mark on and in connection with goods and/or  
23 services that are identical or substantially identical to Plaintiff's Goods and Services.

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26 **COUNT I**

27 **Violation of 15 U.S.C. Section 1114**

28 **Federal Trademark Infringement**

22. Plaintiff incorporates by reference the allegations of Paragraphs 1-21.

1 23. The unauthorized use by Defendants of Plaintiff's Mark on goods and  
2 services identical or substantially identical to those of Plaintiff is likely to cause  
3 confusion, mistake, or deception and thus infringer Plaintiffs trademark rights in its  
4 federally registered mark under 15 U.S.C. Section 1114.

5 24. On information and belief, the misappropriation of the Mark by  
6 Defendants on and in connection with goods and services identical or substantially  
7 identical to those of Plaintiff is part of a deliberate plan to trade on the valuable  
8 goodwill established in such marks.

9 25. With knowledge of the plaintiff's ownership of the Mark, and with the  
10 deliberate intention to unfairly benefit from the goodwill generated thereby, the  
11 actions of Defendants have been carried out in willful disregard of Plaintiffs rights  
12 in violation of 15 U.S.C. Section 1114.

13 26. On information and belief, Plaintiff has been injured by diversion of sales  
14 from itself to the Defendants.

15 27. On information and belief, Plaintiff has been injured by dilution of the  
16 value of the Mark by the Defendants.

17 28. No adequate remedy at law exists to make the Plaintiff whole for the  
18 Defendants' continued willful infringement of Plaintiff's Mark.

19 29. On information and belief, this Complaint is likely to succeed on its  
20 merits.

21 30. On information and belief, irreparable harm has been done, and continues  
22 to be done, to the Plaintiff as a result of Defendants continued willful infringement  
23 of Plaintiff's Mark.

24 31. On information and belief, Defendants will experience no significant  
25 hardships as a consequence of being barred from infringing Plaintiff's Mark.

26 32. On information and belief, the public interest will be served by barring  
27 Defendants from infringing Plaintiff's Mark because the likelihood of confusion  
28 among consumers will be eliminated.

**COUNT II**  
**Violation of 15 U.S.C. Section 1125(a)**  
**Federal Unfair Competition**

33. Plaintiff incorporates by reference the allegations of Paragraphs 1-32.

34. Upon information and belief, the unauthorized use by Defendants in commerce of Plaintiffs Mark on goods and services identical or substantially identical to that of Plaintiff is likely to cause the public to mistakenly believe that Defendants' business activities and goods and services originated from, are sponsored by, or are in some way associated with Plaintiff, constitutes false designations of origin or false descriptions or representations and is likely to cause the Mark to lose its significance as indicators of origin.

35. No adequate remedy at law exists to make the Plaintiff whole for the Defendants' continued unfair competition and ongoing use of Plaintiff's proprietary technology.

36. On information and belief, this complaint is likely to succeed on its merits.

37. On information and belief, irreparable harm has been done, and continues to be done, to the Plaintiff as a result of Defendants' continued willful use of Plaintiff's proprietary technology.

38. On information and belief, Defendants will experience no significant hardships as a consequence of being barred from using the proprietary technology pirated from the Plaintiff.

39. On information and belief, the public interest will be served by barring Defendants from using Plaintiff's proprietary technology because development of valuable proprietary technologies is incentivized by providing legal protection for such technologies.

40. Upon information and belief, the actions by Defendants are in violation of 15 U.S.C. Section 1125(a). Defendants; and otherwise infringing rights in the Mark, and competing unfairly with Plaintiff.

41. That Defendants willfully infringed Plaintiffs rights.

**REQUEST FOR RELIEF**

- A. That Defendants be required to pay to Plaintiff such damages, statutory or otherwise greater than \$100,000 pursuant to 15 U.S.C. Section 1117, together with prejudgment interest thereon, as Plaintiff has sustained as a consequence of Defendants' wrongful acts.
- B. Order the disgorgement of all of Defendant's profits and advantages wrongfully gained by Defendants related to Defendant's misconduct pursuant to 15 U.S.C. Section 1117(a)(1), estimated to be greater than \$100,000.
- C. That all damages sustained by Plaintiff be trebled pursuant to 15 U.S.C. Section 1117(a).
- D. That Defendants be required to pay to Plaintiff attorney's fees, expenses, and costs incurred in this action pursuant to 15 U.S.C. Section 1117(a)(3).
- E. That Defendants deliver up for impoundment during the pendency of this action, and for destruction upon entry of judgment, all products, fixtures, writings, signage, art work, and other material which infringe Plaintiffs rights, falsely designate source or origin, or otherwise facilitate Defendants' unfair competition with Plaintiff.
- F. That Defendants notify all third-party search engine operators of this order and request that such operators assure there is no longer any association between any of Plaintiff's marks or slogans with any Web site operated or controlled by the Defendants.
- G. Permanently enjoin Defendants from use of Plaintiff's Mark and/or any confusingly similar marks.



- 1 H. Permanently enjoin Defendants from use of Plaintiff's proprietary  
2 technologies for modification of bathtubs for access by handicapped  
3 persons.  
4 I. That Defendants be directed to file with this court and serve on Plaintiff  
5 within thirty (30) days after the service of an injunction, a written report  
6 under oath setting forth in detail the manner and form in which Defendants  
7 have complied with this injunction.  
8 J. That plaintiff be granted such further relief as the Court may deem  
9 appropriate.

10 **JURY DEMAND**

11 Plaintiff hereby request as trial by jury.

12 Respectfully submitted,

13 Dated: January 29, 2010

The Zobrist Law Group

14 by   
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Dale R. Jensen

16 Attorneys for Defendant & Counterclaimant  
17 ACCESS DESIGNS, INC.  
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